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THE STATE IN ECONOMY V. STATE IMMUNITY IN THE LAW OF WEST-EUROPEAN ECONOMIC INTEGRATION*

§. 1. WHAT IS IT ABOUT

Interrelations of major importance

1. One of the essential traits of capitalist economic integration is, as far as the states affected by it are concerned, its tendency to increase and gradually consolidate state interference in the economic processes. Another trait is its policy to carry into effect this interference through the mediation of the agencies of integration, the joint anthorities and administrative institutions. On the plane of the system of sovereignty and law this has not only entailed the unfolding of an entirely new order of legal norms, what is commonly called community law, but at the same time helped transfer legislation affecting the economy of the countries concerned and embodying state interference to a great extent from the power of the national states to the jurisdiction of the community agen-

cies. Earlier we have already made it clear, how this phenomenon has reacted on the sovereignty of the states.[1] This has been followed by the presentation of the statics and dynamics of capital and enterprises through the analysis of exactly the relevant sections of this community law. In the course of this process, however, attention had to be given also to the *real* existence of the law, i. e. to its effectiveness. This called for a study of the practice of the Commission and Court of Justice of the European Economic Community, and, to some extent, of the national judiciaries. In the course of this study we could again and again witness that in a number of cases affecting the economies of the member states, moreover in certain interrelations even those of extraneous countries, community administrative and judicial, i. e. non-state forums determined the case by directly obligating the member states, moreover in the first place them. It stands to reason that here we have a case of the relaxation of state immunity, i. e. its transformation from state level to community level. The problem is, however, complicated enough and besides from the point of view of the general theoretical appraisal of integration sufficiently important to be treated separately in a coherent form.

This is not the end, however, of the problem of immunity. In the preceding chapters we have been allowed to review several ways of how the states of the Common Market, or the Common Market itself, take part in individual international economic operations, commercial transactions (formation of enterprises, investments, sales and construction contracts, etc.) even directly[2]. The weight of this participation tends to increase in capitalism of the second half of the 20th in general, and in particular within the integration. This again, as has been made clear by several concrete examples in the previous chapter[3], gives rise to the demand that for the safety of commerce, like any other natural person or legal entity, the State should also be bound, by the decision of a forum outside, to meet its concrete obligations of a commercial nature. This again amounts to mark one of the general principles of international law,namely the principle of State immunity, with a query. As is known, State immunity implies that states – unless they wave this privilege – cannot be made subject to agencies outside them, in general to the law and jurisdiction of foreign states. This traditional principle of international law historically and for its content applied to the State as the carrier of sovereignty, to the what were called public law *(iure imperii)* acts of the State, and applies to them even to day. Owing to the new development, however, the proliferation of the commercial or civil law activities of the State, immunity has ceased to tobe in unquestionable in the sphere called *iure gestionis*.

For the socialist literature on law the relativization of immunity in the capitalist countries of the degree demonstrated by facts may even appear as "surprising." Socialist jurisprudence, mostly in agreement with historical development, laid stress on the absolute character of State immunity for all acts of the State.[4] The qualifying term "mostly" has been used merely to indicate that in international trade and in

international practice the waiver of State immunity was even in the practice of the socialist countries not of rare occurrence.[5] Also the statement recurrent in literature as if bourgeois law and bourgeois jurisprudence had developed relative immunity decisively in view of the forceful direct economic acts of the socialist States or to fight the socialist states and discriminate against them, is but a partially adequate representation of facts.[6] Later in this discussion we shall make it clear that relative (limited or functional) immunity is one of the objective tendencies of the recent capitalistic economic development characterized very strongly by state interventionism. This will not, however, modify the fact that relative immunity was resorted to in disputes with the socialist countries some times even without sound legal foundations. Still this is not the principal moving power accounting for relative immunity. Under the actual circumstances of development, in the course of the genesis of socialist economic integration, even in the legal literature of the socialist countries a new light has been thrown on State immunity. With the multiplication of the economic commitments of the states the interest attached to performance and the security of trade has found expression as the recognition of the objective trends of development, in the problem intensely discussed in theory and also in the Council for Mutual Economic Assistance as that of "the liability of the State for its econom undertakings". In the field of undertakings of an economic or civil law nature the main drift of development visibly points in the direction of the institutionalization of the civil law lability of states and state agencies and the settlement of the problem by way of public international law, through agreements.[7]

The aspects of the problem discussed

2. The development of the law of cooperation of the CMEA countries is one thing, and the fate of immunity in the law of the capitalist world and in the West-European economic integration, another. No comparison of theoretical value, disjunctions, similarities, or parallelities can be reached unless we ondertake far-reaching analyses. This work, however, deals with the legal development of the West-European integration. What has been set forth above merely refers to the more or less general interrelations of the metamorphosis of immunity. What follows is simply a description of what immunity is looking like in Western Europe. To this end we have to deal with the following questions: (a)jow has immunity come to be queried in the law of the capitalist countries? (aa) historically and (bb) in the situation as it is; (b) What has the European Economic Community (EEC) contributed? Here the following questions have to be discussed: (aa) the statecommunity public enterprises and immunity; (bb) Court of justice of the EEC and immunity; (cc) European convention on the general institutionalization of State immunity *iure gestions*.

§. 2 HISTORICAL METAMORPHOSIS OF IMMUNITY IN THE LAW OF THE CAPITALIST COUNTRIES IN GENERAL

Historical development

3. Speaking of the details of historical development would carry us too far. This is true for the very reason that to the latest days in international law the cardinal problem of immunity was the appreciation of what are called sovereign and public law acts of the states and state agencies abroad, the privileges of the states and their agencies as carriers of sovereignty enjoyed abroad rather than the *iure gestionis* acts. This is by itself a problem of many ramifications. In this general meaning immunity extended to questions of importance such as the position of heads of state and foreign ministers under international law, diplomatic immunity, the various sidelines of diplomatic immunity (from personal immunity down to the right of asylum), the consular institutions and consular acts, the status and immunities of international organizations under international law, to international instruments like the Vienna conventions of 1961 and 1963 on diplomatic and consular relations, to problems of particular significance, such as the *act of state doctrine*, regarding e.g. the recognition of the legislation on nationalization of foreign states by the country of the forum (e.g. whether or not the forum of the United States may challenge the validity of nationalization in Cuba and on this plea dismiss the action of a Cuban state enterprise for the delivery of property and other assets at the time of nationalization in the United States instead of to the former owners[8]), and finally, what will in a narrower sense be the subject-matter of the present discussion, to the actionability of the State entering into civil law or commercial deals in general entered ito by enterprises, natural persons, merchants, abroad.[9]

4. In the beginning history progressed on a single path. The rule of the feudal age *par in parem non habet imperium* has been generalized by earlier authors, in an absolute form, for the relations of the states (or for heads of states representing them). This was coupled with yet another axiom, namely the *King can do no wrong*, an axiom which even today urges certain Western legal systems to complicated legal expedients when it comes to indemnify citizens for damege caused by state agencies through the intervention of the domestic forum. This axiom too precluded the arraignment of the State before an external forum and its judgement.

The path began to bifurcate at the time when the first attempts were made within the compass of great actions at law to "lure" out the State from this cosy position and defeat it in the open arena of law. This was towards the end of the 19th century. This was also exactly the time when the absolute immunity of the State, among others through forcing back these attempts, grew to a general thesis of international law, and was recognized and applied as such.[10] In the era of *laissez faire* of liberal capitalism the situation of the defenders of the bastions was

a relatively easy one, as the State hardly ever transgressed the boundary of the specific public law and political acts of sovereigns. No sooner than in the period of modern capitalism, when the State made its appearance in social and economic fields earlier considered exclusively private fields erosion began to blur the earlier clear-cut frontier line and undermine the formerly strong bastions. In the countries of the Common Market the first striking breach was made in the ramparts of State immunity exactly by the English law which after much to and fro has in general remained the staunchest champion of absolute State immunity in the West. In the what is called and often quoted in literature the *Charkieh case* the proceeding judge held: "No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorise a sovereign prince to assume the character of trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character".[11]

After the partly successful, partly abortive onslaughts of the aftermath of the First World War the symbiosis of absolute and relative immunity was characteristic, nevertheless with the gradual progress of the latter. This tendency manifested itself in the judicial practice of the different capitalist countries (since there was no generally recognized source of international law admitting or barring relative immunity), in the legal press, and further in the various particular attempts to settle the problem of immunity in certain concrete fields, so e. g. as far as State owned vessels were concerned.[12]

The situation at present

5. When now the vast number of cases produced by the practice of the capitalist states in the sphere of relative immunity, in particular in the period after the Second World War, is carefully sifted,[13] then among others the following statements of a more or less general nature may be made.

a) Naturally with validity for the definite questions involved in the dispute these decisions are overwhelmingly negative in their nature, namely in the meaning of the world that they refuse to admit the plea of immunity put in by the State at all, or admit it partially only. In other words in the decisions the notion of relative or functional immunity manifests itself.

b) This fairly general trend does not, however, preclude the adaptation of decisions inclined to prefere national interests of the country of the forum. National interests prevail in particular when it comes to settle questions like where the line has to be drawn between *sui generis* state acts and *sui generis* commercial acts, or what agency may qualify for the state character in the-strict sense of the term, and what cannot, or

may a plea of immunity be brought forward in a procedure against state-owned vessel, when this vessel has been used for private transports, etc. It must be stated that the settlement of such and similar borderlire cases is even *sine ira et studio* not free from problems, especially when,what is of frequent occurrence, there is a certain partiality for the own country on the part of the forum judge. On the other hand it remains a fact that though fraught with contradictions; still eventually for state interests conceived in a more generalized form, many a country has introduced relative immunity of uniform effect. This has become e.g. the practice of the United States[14] and the same trend prevails when the balance is struck in the practice of the countries of the European Economic Community. In a most determined form the trend manifests itself in the positions taken by the Institute of International Law and in particularly in the recently signed European Convention on State Immunity, which will be discussed later.[15]

c) A frequent phenomenon is the waiver of immunity (within a definite sphere, in an interstate agreement),[16] or the much argued practice of tacit or implied waiver.[17]

d) For an appreciation of the trend in functional immunity here outlined it is not a matter of indifference to note that the overwhelming majority of decisions in the vast number of cases applies to the capitalist countries and are meant to curtail *their* absolute immunity. Sporadically these decisions affect also the socialist countries. However, among the decisions coming under this heading there are some which have not allowed to argue the state character of the organ in question of the given socialist State.[18]

6. For a review of the judicial practice of the EEC countries in the light of some of the decisions of outstanding importance it is worth while to select what are called leading cases from British, West-German, French and Italian practice.

British practice is wavering and clings perhaps most tenaciously to the principle of absolute immunity, notwithstanding the enormous mass of domestic criticism finding expression exactly in the judgements "nilly-willy" mostly in favour of the principle of complete immunity. Not only some of the judgements expressed, but even the Lord Chancellor thought, that the situation was untenable, and therefore under the chairmanship of a member of the House of Lords an "inter-departmental" committee was set up whose function would have been the codification of new rules relating to the nature of the legal dispute rather than to the subjective character of the party in the litigation (the defendant state). Unfortunately, however, the committee was unable to reach any final conclusions.[19] Thus, presumably, until the House of Lords as supreme instance will pronounce a judgement which may constitute a precedent, or the United Kingdom as member of the European Economic Community will ratify the European Convention on State Immunity development will largely depend on the casualness of the practice of the lower courts.

French practice already draws a clear-cut line between *iure imperii* and *iure gestionis* acts, and for the latter declines to recognize State immunity. In 1969 the Cour de Cassation by giving judgement against the management of the Iranian State Railways reinforced the earlier established principle according to which State immunity was based on the nature of the act in question and not on the status of the subject-at-law performing the act, immunity could therefore be claimed only by an *acte de puissance publique*.[20]

Of decisions passed in the Federal Republic of Germany the judgement of the *Bundesverfassungsgericht* of 1963 which did not recognize the plea of immunity advanced by the Iranian Embassy in Bonn in an action instituted for the payment of the costs of repair of the heating centre of the Embassy. The court held that a distinction between *iure imperii* and *iure gestionis* acts could only be based on the nature of the act of the State or of the resulting legal relation, not on the motive or purpose of the activity (i.e. in order that the Embassy might perform its sovereign activities also in the winter). "What is relevant is whether the foreign State acted in the exercise of its sovereign power, thus in the sphere of public law, or acted like a private person, thus within the sphere of private law".[21]

Italian judicial practice ever since the turn of the century developed on the enforcement of the principle of functional immunity, and has persisted in it to this day. The criteria are, whether the act comes within the sphere of sovereignty or within that of private law.[22]

As may be seen unlike Common Law which ignores this distinction, the Continental legal systems accept as one of the most general *differenciae specificae* the criteria determining the assignment of the act to the one or the other branch of the duality of public and private law.[1] This is, wholly logically, the practice adopted by the Benelux states[23]. The want of the applicability of this discrimination was one of the cause-why the British committee was unable to take an unombiguously diffe rentiated position.

§. 3 IMMUNITY AND EUROPEAN INTEGRATION

Litigation in relation to community or interstate public enterprises and immunity

7. As regards the judicial appraisal of the operative economic acts of the States (or the Community as public law institution) the West-European economic integration has, in order to proceed from the particular to the general, brought on the stage the multitude of concrete particular cases and the variants of solutions in connexion with the interstate or community public enterprises discussed in the previous chapter. Since these enterprises owe their existence to interstate agreements or community acts the fact that the signatory states have, in

these agreements refrained from placing their disputes on the of immunity in some sort of a legal vacuum, and have therefore subjected themselves to the various forums, may be valued as a waiver of State immunity, an act to which every state is entitled and at any time. Still here the gist lies in the contents, namely in the circumstance that here in general we have transactions coming within the sphere of commercial law, so that the logical course was to sublect these concrete undertakings, the foreseeable and unforeseeable yet possible and in eny case complicated disputes under commercial and private law to the legal order of a definite state (occasionally another of state) and to an appropriate forum. This was as necessary for the creation of enterprises and their operation as funds, management, many other things such as statutes, which, as detailed as possible, could not eliminate disputes or settle them in beforehand.

8. Of the principal elements of the legal status of the interstate enterprises the previous chapter discusses the legal disputes of the joint enterprises of the EEC and the interstate enterprises of the member satates and their settlement.[24] As regards immunity the contents of the chapter may be summed up as follows.

a) There are several variants of solutions of disputes. However, the essence of these solutions is on the whole uniform, namely the establishing legal documents leave no doubt as to the applicable law or the forum in the regulation of contingent legal disputes. In other words in the given relations the States waive their immunity and transfer it to a forum occasionally other than their own.

b) There is a whole range of forums from the International Court of Justice at the Hague[25] through tribunals of arbitration[26] and the domestic courts of the member states[27] down to the Court of Justice of the EEC or any other agency of the EEC[28]

c) Since the creation of the EEC there is a marked tendency to refer legal disputes to the Court of Justice of the Community or to the courts of the member states[29].

The Court of Justice of the European Economic Community and immunity

9. What may give us thought before all is, why should there be any talk of the Court of Justice of the EEC in connexion with immunity. As a matter of fact here we have a forum created by international agreements whose jurisdiction in matters defined by the agreements has been recognized by the member states of their own will. Consequently the problem of whether or not the member states may bring forward the plea of immunity has been settled. And yet here we have a problem not of whatever kind of the institution of immunity. First, what may sound as a formal argument, the European Convention on State Immunity, too, considers the contractual waiver of immunity one of the particular cases of the limitation of classical State immunity[30]. The other well-known forum of international legal life, namely the International Court of Justice

at the Hague also functions on the principle of voluntary submission.[31] What is essential, however, is hidden in the contents. Notably that partly in the mass of legal disputes, newly arisen by way of the integration, partly in a number of cases formerly coming within the jurisdiction of municipal law jurisdiction has been transferred to a forum relatively segregated from the states and in these – on considerations of international law – extremely important legal relations traditional State immunity has simply been set aside. When now the phenomenon is analyzed on the ground of the historical interrelations of institutions the statement advanced by one of the prominent writers on the subject will hold, namely that „the agreements creating the Community have vested the Court with functions and rights which as regards both their sphere and the difficulties associated with them are without par in history[32].

10. In a slightly more concrete form, What is it all about? As formulated by the Montanunion Treaty, the Rome Treaty and Euratom Treaty economic integration before all implies the coordination of the public law regulatory system of the member states relating to economy, i. e. the harmonization of the acts of the states, or their subordination to united or integrated action and in the meantime their display in partially new legal institutions or communicy regulatory systems. Facts and practice demontrate, and the underlying system of norms presuppose, the birth of a huge mass of contradictions and disputes in this process. The subjects of these disputes are in the first place the member states and the Community, or still better their public law agencies. Yet even beyond this the integration, through its directly operating and applicable norms, brings about a growing number of legal relations and disputes between the states, the Community and private parties. From the very beginning as objective necessity two fundamental principles cling to the legal mechanism of the integration as a whole: first, for the settlement of the disputes and the solition of the contradictions a forum capable of making decisions of a binding force, and also authorized thereto, secondly, the disputes and contradictions would according to the various national or economic group interests operate towards disintegration unless there were a forum which would be vested with authority for making decisions in individual cases, but also with the function to direct the settlement of the disputes and the main drift of judicial practice in accordance with the concept of integration.

These are the logical and legal premisses which have led to the creation of the Court of Justice and to its unprecedented jurisdiction and eventually to the forceful and partial absorption of the immunity of the member states. At the formation of the Montanunion in the beginning the idea was to bring about a political forum operating in the capacity of a committee of arbitration. This idea rapidly yielded to the principle of juridicial legal control.[33] In the charters of the three communities, víz the European Coal and Steel Community (Montanunion), the European Economic Community and the European Atomic Energy

Community (Euratom) there figures the Court of Justice, now a common organ of fundamental importance of all three communities. The significance of the Court of Justice will be even more conspicuous if it is remembered that whereas the Euratom Convention deals in eight articles with the general assembly, in nine articles with the Council of Ministers, in eleven articles with the Commission, the provisions governing the Court of Justice absorb altogether twnty five articles[34]. The same may be said of the convention on the European Coal and Steel Community and the Rome Treaty[35].

11. An enormous mass of publications have accumulated during the past twenty years dealing dealing with the jurisdiction of the Court of Justice of the European Economic Community, its functions and its juddicial practice, its principal features and general relations. This continuous flow of literature has grown to an eqtent that the bibliographical series startes in 1965 already amounts to several volumes. The bibliography processes thies literature according to a definite system and by a structural scheme facilitating access to it and so also its study[36]. There is also a large number of monographs of recent date and papers on theory and principles[37]. This proliferation of literary matter may be explained partly by the undoubtedly important role of the Court, partly by the approach of West-European jurisprudence to, and its valuation of, the judicial practice. Mostly under the impact of Common law interest is attracted by how all this comes to fruition, and finally by what is „meted" out by virtue of the disposition of the enforcing forums to the addressees of statute law rather than by statute law, i.e. the law condified by the various sources of law. As will be seen this policy is nourished also by the ramified generative functions of the Court, functions, it performs beyond the purely technical application of law.

To deal with each of the principal features and the general interrelations would lead us too far. Of the questions here ingored we would simply refer only to such ones as the peculiar organization of the Court, its procedural order, the use of languages, its composition and to the circumstance that with the entry of Britisch judges the organizational and legal arteries of the convergence of approaches, legal notions and legal parlance will tend to get more and more common or harmonized. The sources here referred to offer a more detailed survey of the questions in the same way as in addition to the knowledge of source and judicial practice so far processed they have helped discuss the principal features and intere lations in the concise form below.

a) One of the most general features is perhaps the critical thesis that the functions and sphere of authority of the Court, by which, if in a derivative and relative form only, it has grown to a power institution rising above the member states, have come to mean the waiver not only of State immunity but, partially, also of national sovereignty. This fact has been pointed out by a number of judgements passed by the Court. When Italy in a case of nationalization opposed the consultation of the Court for its preliminary position in the case, which was demanded by

a Milan court of law, the Court of Justice made it clear that although it did not challenge the position-taking of the Italian state in the merits of the case, still for its bearing on the Rome Treaty the Court of Justice might as well deal with the case. The Court held that it clearly followed from the Rome Treaty that thereby the signatories wanted to restrict their sovereign rights[38]. Even if it is unjustified to exaggerate the restriction of sovereignty[39] (in socialist literature too it has been pointed out that there is no reason to speak of a comprehensive or some sort of *va banque* waiver and liquidation of sovereignty in the European Economic Community[40] the fact remains that the Court of Justice with its mere existence, in particular, however, with its jurisdiction and practice, has on the part of the states quantitatively decreased, on the part of the Community quantitalively increased what is called the actual *imperium* of a subject at international law, or in general sovereignty, or the status under international law[41].

b) The other general feature of the Court of Justice manifests itself in the principal functions following from what has been said above. These consist in the shaping of judicial practice with a view to integration, the filling the gaps in the law by way of creative interpretation, the channelling of the contradictions of the more and more spreading community law fraught with many anomalies; in the supervision of the acts of the Council of Ministers and the Commision for their constitutionality; in disputes between the states and Community, and within the given sphere, between private parties and states or the Community in guaranteeing defence corresponding to the concepts of the basic conventions for the parties in the disputes, in particular to safeguard the rights of the civil and commercial law subjects of the Common Market (Marktbürger und Marktunternehmen) against the extensive executive powers of the Community, i.e. the arguable measures of the Commission; in the permenent control of the relations and line drawn between Community and municipal law, and their concrete and dynamic realized in judicial practice; in the actual enforcement and development of Community economic policies, in particular of the mass of legal provisions of economic competition and market mechanism; in the formulation of autonomous Community principles and methods of the interpretetion of law, in particular in the reinforcement of the practice of preliminary rulings[42].

c) In conformity with the known concepts of the western theory of state and law, literature on European Community law has transferred the theory of division of the branches of sovereign power also to the agencies of the Community and considers the Court of Justice of the EEC the organ of the third branch of sovereign power[43]. Marxist criticism of this theory in socialist literature is sufficiently known. Many of the concrete judgements discussed in the previous chapters indicate, in respect of the practice of the Court of Justice of the European Economic Community, how far it is from being some sort of segregated and total independency, and how short it is of forcing back national interests and those of certain capitalist groups even on the level of autonomous power and the institution

of measures which it is considered justified to attain even Western European professional literature[44].

12. Now in accordance with the normative sources of law it is intended to break down the jurisdictionf of the Court of Justice into groups of concrete competences, it will become clear that a better survey justifies an approach *ratione personae et marteriae.*

a) In the light of an approach *ratione personae* the following persons, or subjects-at-law are qualified for sueing in the Court of Justice; in respect of these the Court may exercise its competence: 1. the organs of the Community; 2. the member states; 3. in labour disputes, the employees of the Community organs; 4. natural persons and legal entities domiciled in the Community in so far they are addressees of the Community legal normatives (fields of particular importance under this heading are the rules governing economic competition, antitrust legislation, customs law, free settlement, etc.); 5. in definite cases alien natural persons (e.g. for the application of antitrust legislation to aliens[45] which may even include Hungarian enterprises and such of other socialist countries. The radius of the personal sphere is both for number (which includes all agencies and subjects-at-law, inhabitants of the EEC countries, i.e. several millions with the outer sphere added) and for the nature of the subjects-at-law concerned (fromthe member states through large enterprises to workers and university professors resettled) fairly great.

b) As regards the material side, the following principal categories of competency may be distinguished.

aa) The Court of Justice proceeds somehow in the capacity of a court of constitution in disputes of the member states on the application of the basis conventions[46], in disputes on measures of the Commission affecting the member states[47], in disputes between the agencies of the Community, or the agencies and the member states on the conduct of the Community (acts or defaults)[48], in questions of the interpretation of conventions, further on by the way of preliminary rulings in matters of validity and interpretation of the acts of the Community, i.e. questions of the monopoly of interpretation[49] in positions of a constitutional character taken up in matters not formulated by a judgement[50].

bb) The jurisdiction in disputes orginating from particular state or community measures affecting the subjects of economic and civil law relations has, in Common Market countries recognizing this category, received the designation of administrative jurisdiction or administrative court. English literature is little concerned with this classification and in general resorts to paraphrases whenever it turns up[51]. This category includes the bulk of legal disputes affecting enterprises and economic competition a large portion of provisions included in judgements passed by the Court of Justice, further any legal dispute where a national, natural person or legal entity, of the European Economic Community may by virtue of a Community provision or measures, or legal transactions (such as e.g. State-Community orders) apply for legal aid or individual legal remedy under the fundamental conventions[52].

cc) From this by its nature the jurisdiction of the Court of Justice in disputes arising in the management of certain economic institutions such as the European Investment Bank[53], or under the Euratom Convention[34], the joint enterprises earmarked for generalization[55], is somewhat segregated.

dd) All three basic conventions vest the jurisdiction in labour disputes up in the agencies of the Community in the Court of Justice[56].

ee) The Court of Justice proceeds within its jurisdiction in actions for damages for extra-contractual loss caused by the agencies and employees of the Community with their activities in authoritative competences. As applicable law the Rome Trearty names the common general principles of the regulation effective in the member states[57].

ff) Finally the Court of Justice has by no means insignificant powers in the enforcement of the effective decisions of the Community organs (Council of Ministers, Commission, Court of Justice), in the levy of eqxecutions and other acts of execution[58].

13. The real weight of this momentous jurisdiction and *imperium* could best be appraised through a deep-reaching sociological, statistical and theoretical analysis. Unfortunately here by quoting some sources of importance only[59] we have to restrict ourselves to giving a few data and guiding remarks.

a) Of the data[60] the more expressive figures and classifications of major importance offer the following picture. By virtue of the three basic conventions until December 31, 1971, altogether 813 cases were brought up before the Court of Justice[61]. The annual average of cases rose from the initial four to ten to thirty in the year, and then rapidly to the present seventy to ninety. If the weight of the cases is remembered, e.g. the judgement in the Farbstoffe case (a legal document of close to thousand pages also of significance in economic policy), or other products of law application processed in other chapters of the present work, the figure can hardly be considered insignificant.[62] The collection of judgements embraces large volumes. According to sources exploring the minutes details the French edition of the court decisious numbetred 10,000 pages as early as the end of 1967[63] a a mass wich by extrapolating the number of judgements may today be close to 20,000 pages. A large part of actios (about two thirds of all) has been brought against the European Coal and Steel Community and the Commision of the European Economic Community. This is an indication of the prompt and efficient operation of the executive organs: they pave the path to integration, though with many errors and often with the by no means slight opposition of those concerned.[64] The questions making up this work, viz. competition cartels, monopolies, enterprises, settlement, taxation, subsidies, immunity, partly the own jurisdiction of the Court, account for about one third of the 813 cases (altogether 289 cases).

b) The guiding remarks follow a dual purpose. First, they convey an idea of the strong criticism launched from a number of standpoints against the Court of Justice. The single-instance pocedure in a number

of questions, so in labour disputes, further in cases where private parties (enterprises and persons) are in either position of the dispute, seem to violate the guarantees of legal remey. Procedure is protracted and slow. The domestic courts are not very active when it comes to apply for preliminary rulings. The Court is not courageous enough to enforce its own principles in a decisive form through these rulings.[65] In the previous chapters in connexion with a number of cases it has been made clear that neither side viz. those advocating the principles of integration and those standing for the partisan capitalist and national groups, were satisfied with certain judgements of political weight.

The second part of the remarks want to throw light on the fact that the judicial practice of the Court, what cannot be argued, could on the whole stand the mettle: to the maintenance of the equilibrium of the EEC machinery it has contributed on a high level of bourgeois administration of justice. In its practice, where each judgement often contains a long series of judicial provisions and normatives, it enforces thousands of commands of law application, commands which have a substantial share in the formation of what may be called the Community order of law and Community legal thinking. The many thousands of provisions expressed in the judgements of the Court affect most of the essential elements of the norms called to life by the founding conventions and Community organs,[66] so that the concepts of integration of the founding conventions are forced on Western Europe with the weight and force of judicial power.

Community law v. member states in the practice of the national courts

14. It would lead us too far if we enlarged on the problem of the relations between Community law and the municipal law of the member states. The same is valid also for the application of Community law by the national courts of law. The problem has extensively been discussed in literature, and also in the field of practice it has turned up on several occasions.[67] Here merely to supplement a patch of colour still missing in the overall picture we shall refer to a few interrelations of the problem. The reason why the problem comes up in this connexion at all lies in the circumstance that the domestic courts of law occasionally have recourse to Community law and not to municipal law also against the organs of the members states and the Community, a policy which by the side of the considerations of Community law already discussed earlier has its separate immunity implications.

The three treaties or conventions consider the principle of the direct application of the provisions of the treaties and conventions and of other Community norms an integral part of the legal order of the integration.[68] This has been confirmed repeatedly also by the Court of Justice of the European Economic Community in a number of concrete cases where owing to the nature of the relevant provision or its formulation there still were ambiguities.[69]

15. If judgements passed by the national courts of law based on the convention creating the European Coal and Steel Community, further the cases referred for preliminary ruling to the Court of Justice of the European Economic Community are now ignored, till the end of 1971 the courts of the member states determined 345 cases by applying the EEC norms. By subject-matter the cases may be split up into the following categories: customs, state monopolies, delivery quotas, agriculture, right of settlement, traffic, employment, cartels, dumping, subsidies, taxes.[70] The classification of the cases already shows that many of the judgements are directed against the agencies of the member states or the Community.[71] Although as far as can be established from an analysis of the practice, the judgements to the prejudice of the member states have so far been passed againts the state of the forum, immunity implications have nevertheless been present, and for that matter in two respects. First, owing to the antecedents (waiver) referred to earlier a law other than their municipal law has been applied against the member states. Secondly, in principle and within a definite scope the judgement may hold also for a member state other than the country of the forum. This may be the case in disputes of a joint enterprise formed under the Euratom Treaty where several member states were affected, and where also one of the national courts of law would have jurisdiction.[72]

The European convention on state immunity – generalization of functional immunity

16. Although the particular sources of law of the interstate and Community public enterprises, in particular, however, the rather extensive jurisdiction of the Court of Justice in economic, commercial and civil law cases have in a large portion of possible cases shaken off te inconveniences of State immunity, still „liberation" is by no means general. Capital and capitalist economic warfare, the absolutization of economic rationalness of commerce are striving for complete victory. Since the resolution of immunity in the former two spheres, viz. in the sphere of norms incorporated in the charters of the interstate and Community public enterprises and those relying on them, has to be understood in the strict meaning of the term and in a narrow sense it is valid for state acts performed within the scope of integration, the bastions of immunity of other operative acts of the states and the elemen°s of immunity in questkon are in this general meaning still awaiting demolition

Integration has given considerable impetus to this trend from two sides. First, with the growth of direct state and Community undertakings from the side of economy, and with the operation of the legal mechanism outlined above also from the side of the law the main buttress of absolute immunity has not only been exposed to a heavy impact, but also crushed. An army in continunous advance is by itself one of the source of further conquests. This is the case also with immunity. Why not hoist the flag when the bastions have been occupied at so many places? Why not

be striving for complete and general domination? And where is the troop which still defends the fortress, when practically all is in the hands of the conquerer, and even the flag is lost?

Secondly, the other impetus of more or less objective contents comes from the tendencies of the integration towards consolidation and harmonization. Although according to the development outlined in the previous sections judicial practice in general indicates the strengthening of functional immunity. However, in the EEC countries first, this development has not taken place with uniform contents, moreover, not even to the same degree,[73] secondly, judicial practice may in any form keep to the general "main drift" in a more accidental manner than any general convention.

17. This was the background against which the 1964 Dublin session of the Conference of the European Ministers of Justice "with a view to choosing the best method of resolving the difficulties"[74] put on the agenda the problem of immunity. As the outcome of this conference in the seventh conference of the European Ministers of Justice, in Basel, on May 16, 1972, the European Convention of State Immunity and the supplementary protocol were submitted for signature. Drafting work was completed in fourteen sessions of the appointed committee, between 1965 and 1970. Although other countries ot the Council of Europe also cooperated, essentially the Convention has been created by the states of the European Economic Commuity and signed by them so far (even by the United Kingdom, although for what has been set forth here a turning point is still abead).[75]

18. Which are the pillars of the Convention and which are the principal questions it settles?

a) One of the critical questions was whether simultaneously with relative immunity the Convention also should implay the enforcement of judgements against foreign states, and the obligatory toleration of it by these states. If the Convention has not extended to this question, first, it would have turned the doctrine of non-immunity into a *lex imperfecta*, a dead lette, secondly, it would have meant no surplus worth mentioning for the majority of the signatories, which for practical purposes were anyway acting on the ground of functional immunity. A neuralgic spot in the protracted debate on the problem was the overdemonstrative "humiliation" of State sovereignty, which in the course of forced execution against the State would have become a matter of routine. To this would have been added a procedural system hard to bring under legal regulation. Finally the following Solomonic solution was adopted: §. 23 of the Convention put a ban on the forced executions against states, still on the terms incluced in §§. 21 and 22 the states undertook to enforce judgements passed against them by the courts of law of the signatory states to the Convention in legal relations defined by the Convention, on a voluntary basis. Against a wide or exaggeratedly restrictive construction given to the Convention both the plaintiff and the defendant states may have recourse to a special forum. According to §. 21 this may be

the competent court of the defendant state: before this court either party may apply for a declaration whether or not the proceeding forum of the foreign state has remained within the purview of the Convention, or has gone beyond this. The declaration will then decide whether or not the state concerned is bound by its undertaking of voluntary performance of the judgement. Part One of the Protocol supplementing the Convention adds an optional procedure to this, notably the plaintiff may apply to a tribunal formed of seven members of the European Court of Human Rights to establish whether or not the case is one governed by §. 21 of the Convention.

b) What had to be settled next was to draw the line between acts of sovereignty protected by State immunity and other *iure gestionis* acts, for which immunity cannot be claimed. The one, though for its divergency by states rejected solution would have been to authorize the courts of the foreign state to proceed in cases of commercial and civil law relations where another State was participant and the domestic courts of this other State would proceed against their own State. Another, though for its resisting attempts at clearing up or formulation likewise rejected solution would have been to draw up catalogues of *iure gestionis* and *iure imperii* acts. A third solution was then suggested and adopted. Notably in §§. 1 to 15 of the Convention the cases were defined which could not enjoy immunity (these being the exceptions), whereas as a general rule the unrestricted immunity of the State was declared. In the following paragraph we shall see to what extent these exceptions have narrowed down the general rule.

c) The third question of general significance concerned the *iure gestionis* practice of the Contracting states going beyond the Convention. Should these states withdraw, or may they remain beyond the line of demarcation drawn by the Convention? Again capital running after its money came out on top. As a matter of fact the Convention declares that the Contracting States may in the limitation of immunity to the prejudice of another Contracting State go beyond the "catalogue" ot the Convention to the extent their courts developed rulings against States not party to the Convention.[76]

19. As regards the catalogue of the non-immunoty cases this may be compiled from the Convention as follows.

a) The categories of non-immunity formulated by the initial provisions do not depend on the notion of *iure gestionis*. Thus in the same case the State which institutes proceedings against another cannot plead immunity, nor can a defendant State having recourse to a cross action.[77] Nor can a State plead immunity which in any form, e.g. in the contract in dispute, or in an international agreement, or in any phase of the procedure, has subjected itself to the procedure of the foreign court. In the meaning of what has been said before subjection, and so constructive waiver of immunity, is also the case when the State makes an appearance before the foreign forum to plead on the merit of the case, without previously putting in the plea of immunity.[78]

b) All other cases of the "catalogue" are, however, the codification of non-immunity *iure gestionis* cases. When now any possible exceptions so e.g. *expressis verbis* conflicting agreements are ignored, cases where no immunity can be claimed are the *iure gestionis* obligations which have to be discharged in the country of the forum,[79] the labour contract relating to work to be performed in the country of the forum,[80] disputes arising in connexion with joint enterprises formed with private parties (natural persons and enterprises), or legal entities, if the seat (registered office) of the legal entity is in the country of the forum,[81] proceedings in cases of the institutions (agencies, offices) of foreign States in the country of the forum arising from their industrial, commercial or financial activities performed as private parties,[82] cases relating to industrial property registered and infringed in the country of the forum, and the foreign State is e.g. in a case of infringement of patent, participant of the legal dispute,[83] cases related to the immovable property or succession of foreign States, if the immovable property is in the countra of the forum,[84] clamis for damages when the author of the injury, i.e. the State causing it, is somehow present in the territpry of the occurrence of the fact,[85] disputes arising from the interpretation of agreements of arbitration, if the dispute arised from civil or commercial matters by agreement to be sub mitted to arbitration and procedure has to be instituted in the country of the forum,[86] finally the Convention incorporates a general provision which recognizes the rule of the *lex rei sitae* in matters of the supervision and administration of property irrespective of any right or interest of the foreign State in the property; nothing contained in the Convention can be construed so as to defeat this provision.[87]

20. There are yet other interrelations of the Convention worth discussion. So e.g. of the highly arguable attempt of the makers of the Convention to define the notion ot the State as regards nonimmunity.[88] Furthermore the Convention cannot be applied to disputes of immunity in connexion with State-operated sea-going vessels, social insurance, nuclear damage, customs duties and taxes, damage caused by the armed forces by either acting or failing to act. The Convention extends in no way to diplomatic or consular immunity which is already governed by international law.[89] In the relation of the Convention to the integration there is but one point worth mention. As a matter of fact, as has already been an effect pointed out[90] whereas the Convention itself is an effect of the trend towards integration, after coming into being the effect has itself become a cause: notably the Convention operates towards the approximation and consolidation of the relevant law and legal practice of the Contracting States. This is one of paths on whichs integration may achieve the harmonization and consolidation of the legal norms affected or exploited by it. This been formulated in the professional press of the United Kingdom, one of the Contracting States as follows: "For the United Kingdom, as a State which has long applied the absolute immunity rule, to have signed a Convention so clearly giving substance to the rule of restricted immunity is surely an indication that serious thought will

now be given in this country to taking legislative steps to limit the circumstances in which State immunity can be claimed. At this moment in time, with the recent entry of the United Kingdom into the European Communities, it would seem all the more important for us to seek to align our practice in the field of State immunity more closely with our Western European neighbours".[91]

* This, Chapter X, is part of the author's work "Enterprise and Economic Competition in the Law of the West-European Economic Integration" divided into eleven chapters, altogether 42 sections and 339 paragraphs. References to the complete work are distinguished by these numbers of the chapters, sections and paragraphs. The present Chapter offers and analysis of legal policy and legal practice. A theoretical and critical appraisal is given in Chapter XI.

[1] See Chapter IV, paragraph 90.

[2] See §§. 33 and 35.

[3] See paragraphs 302 – 303.

[4] Although there is no entry on immunity e.g. in Diplomácia i és nemzetközi jogi lexikon (Dictionary of diplomacy and international law) ed. by Gy. Hajdú (Akadémiai Kiadó, Budapest, 1967) nor does the university textbook on international law (Buza – Hajdú) make mention of it and deals only with diplomatic immunity (p. 209 et seq.), and so neither the new university textbook on international law (ed. Haraszti, Tankönyvkiadó, Budapest, 1971, pp. 236 et seq.), what has been stated here is clear from the discussion of the textbook on sovereignty (pp. 85 et seq.), from the section of the new textbook on the methods of settlement of disputes (pp. 329 et seq.), further from several comments on socialist private international law (see e.g. Világhy (2), p. 97): this is also the opinion of Western literature (Deák, p. 431: The Soviet Union and the East European Countries continue to adhere to the theory of absolute immunity): neverhteless, it has to be emphasized, that the Czechoslovakian Code of private international law in § 47 declared relative immunity in non iure imperii cases, and the same happened in the Polish Code of Civil Procedme (§ 1111 and seq.).

[5] The Soviet Union has signed a number of commercial and consular agreements where, restricted to the transactions entered into by her foreign trade representations, she waived the immunity of these representations. As is known these representations operated as branches of the diplomatic representations and so in general they could enjoy diplomatic privileges. (See e.g. the Swedish – Soviet agreement of 1927 on the commercial representation of the Soviet Union in Stockholm, §.4 of the Soviet – Austrian convention of 1955 on the legal status of the transactions of the commercial representations: sources: Makarov, vol. II, pp. 45 et seq., 240 United Nations Treaties Series, pp. 304, 314: for the theoretical exposition of the situation in Soviet literature see Boguslavskiy, pp. 323 et seq.)

[6] Világhy (2), pp, 96 and 97.

[7] For details see Kálmán, Gy.: A KGST-államok anyagi felelőssége gazdasági kötelezettségvállalásaiért (The financial liability of the CMEA states for their economic undertakings), Jogtudományi Közlöny, vol. 1972, pp. 290 to 298: Mádl – Sólyom, pp. 209 et seq. (chapter "Extension of the liability of the States for the performance of their economic obligations").

[8] For details see Mádl (8), pp. 87 and 88: Deák, pp. 445 to 449.

[9] On the comprehensive elaboration of the ramified problems of immunity see Deák, pp. 381 et seq.: Buza – Hajdú, pp. 209 et seq.

[10] For the historical development and its analysis see Deák, pp. 424 et seq.: for the immunity of the foreign representations of the Mediaeval city states see Buza – Hajdú, pp. 44 to 46.

[11] The quotation from the judgement passed by Sir Robert Phillimore in the Charkieh case – 1873, L.R. 4 A and E. 59 – has been published by Sinclair, p. 256.

[12] This development of things has been dealt with by a relatively voluminous literature, so Lauterpacht, pp. 220 et seq.: Lalive, pp. 84 et seq.: Deák, Bp. 425 to 427: Sinclair, pp. 255 to 262: Ehrenzweig – Jayme, p. 134; a research team at Harvard University drew up a draft convention on relative immunity as early as 1933 (Draft Convention on the Competence of Courts in International Law, American Journal of International Law 2 vol. 26 (1933), Suppl. pp. 587 et seq.) In 1926 the Brussels Convention on the Immunity of state-owned vessels was signed (176, League of Nations Treaties Series, p. 199).

[13] The cases have been published by: Deák, pp. 427 et seq.: Lauterpacht, pp. 220 et seq.: Sinclair, pp. 262 et seq.

[14] In the United States, on June 23, 1952, in the so-called Tate Letter the Government informed the Supreme Court that when foreign states in actions in American courts put in pleas for the recognition of their immunity by the American Government the State Department would adhere to the principle of restricted immunity, because "the widespread and increasing practice on the part of governments engaging in commercial activities makes necessary a practice which will enable person s doing business with them to have their rights determined in the courts." There is a Bill in process of drafting which by by-passing the Department of State in general refers the establishment of relative immunity to the jurisdiction of the courts. Actually the Department of State establishes the existence or non-existence of relative immunity and advises the proceeding court of its finding. (See Sinclair, pp. 262 and 263: Ehrenzweig – Jayme, pp. 134 to 136).

[15] The 1954 Résolution of the Institut de Droit international speaks of the general immunity of the states. However, it has a section according to which although in general foreign states cannot be made subject to judicial procedure or acts of distraining, both will be possible if the act in question does not qualify as an *acte de puissance publique*. Whether or not an act will qualify as such comes within the furview of the *lex fori*. (Annuaire de l'Institut de Droit International, vol. 45. II. 1954, pp. 293 to 295).

[16] For the Soviet practice see Note 5 above, in general: Waiver of Immunity and Admission of Counterclaims, in Deák, pp. 441 et seq.

[17] Deák, pp. 442 and 443.

[18] This happened in the Krajina v. Tass Agency case – (1949) 2 All. E.R. 274 –; the proceeding court dismissed the action against the Tass Agency on the plea that the Tass Agency was an organ of the Soviet State entitled to State immunity, although the concrete case could have been qualified as one of commercial nature (therefore the was disagreement with the decision in the proceeding division of the court). See Sinclair, pp. 258 and 259.

[19] See Yearbook of the International Law Commission 1962. vol. II. p. 89: Sinclair, pp. 260 and 261.

[20] Administration des Chemins de Fer Iraniens c. Société Levant Express Transport, 73 (1969). R.G.D.I.P. pp. 883 and 884, further for the similar practice of the lower courts see Sinclair, pp. 264 and 265.

[21] For this development of German practice, from the early notion of absolute immunity to the present day, together with references to literature, (Schumann – Habscheid: Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht, 1969, pp. 161 et seq.) see Sinclair, pp. 263 and 1264.

[22] See Sinclair, pp. 265 and 266.

[23] Ibid., p. 265.

[24] See Chapter IX, paragraphs 302/g and 303/d.

[25] See Eurofima, §.14: Basel-Mulhouse Airport, §.20.

[26] Société Moselle, §.24: Jochenstein Danube Hydraulic Power Works, §.25; Saarlor, §.6 of Appendix 29.

[27] §.49 of the Euratom Treaty declares that the legal disputes of the joint enterprises, also in respect of the member states, come within the jurisdiction partly of the Court of Justice of the EEC, partly of the domestic courts ("Subject to the powers conferred on the Court of Justice by this Treaty, litigation concerning Joint Enterprises shall be dealt with by the competent domestic courts or tribunals").

[28] See the previous Note, or §.16 of the Eurochemic Convention (according to this Conventions in the first instance litigation has to be referred to the special group of the

governing commission of the European Atomic Energy Agency, so Eurochemic has become linked up with the forum system of Euroatom).

[29] This is indicated by the forum system of the joint enterprise meant to become the general form, and also by such a particular large institution as Eurochemic: see the previous two notes.

[30] See paragr. 324 below.

[31] See Haraszti, pp. 219 et seq.

[32] Ipsen (2), p. 373.

[33] See ibid. p. 366.

[34] Euratom Treaty, §§.107 to 114, 115 to 123, 124 to 135, 136 to 160.

[35] Montanunion Treaty §§.7 to 45; Rome Treaty, Assembly, §§.137 to 144: Council of Ministers, §§.145 to 154; Commission, §§.155 to 163; Court of Justice, §§.164 to 188.

[36] See Jurisprudence européenne in the List of Sources.

[37] The following deserve special mention (see the List of Sources): Axline, Brinkhorst – Schermers, Green, Ipsen (2), Lagrange, Nicolaysen, Prasch, Robertson, Strauss, Verdraet – Lecerf.

[38] See Costa v. Enel (Case No. 6/1964), quoted by Brinkhorst – Schermers, pp. 105 to 107.

[39] See Buza – Hajdú, op. 96 et seq. ("Plans" for the liquidation of sovereignty).

[40] See Valki (1), p. 92.

[41] In general the literature of the EEC values it in about the same way. See e.g. the telltale title of Green's work (Political Integration by Jurisprudence) and his corresponding valuation (p. 1).

[42] §.177 of the Rome Treaty: since the normatives of the Community (the charters, too) are overwhelmingly directly effective and the domestic courts apply them directly, disputes may arise in the domestic courts on the interpretation of the given Community law or the legality of the acts of the agencies of the Community. For a uniform settlement of such disputes the Court of Justice of the EEC lays down its decision to be followed uniformly in preliminary rulings.

[43] See e.g. Ipsen (2) p. 366, and similarly in a monograph, Green, pp. XXI et seq.

[44] See e.g. the judgements in International Can (Chapter VIII, paragraph 279) and Müller (Chapter IX, paragraph 295).

[45] See Chapter VIII, paragraphs 259 to 261.

[46] Rome Treaty, §.170; Montanunion Treaty, §.89; Euratom Treaty, §.142.

[47] Rome Treaty, §.155; Euratom Treaty, §. 124: Montanunion Treaty, §.8.

[48] Rome Treaty, §§.173 and 175; Euratom Treaty; §§.146 and 148; Montanunion Treaty, §§.33 and 35.

[49] See paragraph 11, above, footnote 41.

[50] E.g. motions for, or expert's opinions to, amendments of treaties (Montanunion Treaty, §.95), planned treaties with third countries or international organizations (Rome Treaty, §§. 228 and 236).

[51] The one designation reads "Appeals by Private Parties" (Brinkhorst – Schermers, p. 35), the other classifying sub-title is "The Court of Justice Applies Community Law to the Individual" (Green, p. 253).

[52] Rome Treaty, §§.172 to 175, 181; Euratom Treaty, §§.146 at seq., 153; Montanunion §§. 33 et seq., 42.

[53] Rome Treaty, §.180.

[54] See above, Chapter IX, paragraph 300 to 302.

[55] Euratom Treaty, §.49.

[56] See Rome Treaty, §.179; Euratom Treaty, §.152; Montanunion Treaty, §.42.

[57] Rome Treaty, §§.178 and 215.

[58] Rome Treaty, §§.187 and 192; Euratom Treaty, §§.159 and 164; Montanunion Treaty, §§.44 & 92.

[59] See in particular the works of Brinkhorst – Schermers, Verpraet – Lecerf, and also the sections of the General Reports of the European Economic Community on the operations of the Court of Justice.

[60] The agencies of EEC publich so to say, a plethora of data and so does the Court of Justice too. The files of the Court are accessible also in the various publications (see Green,

pp. 562 to 609). The following are the sources of the data published above and ob the classifications: General Report 1971, pp. 528 to 531: Green, pp. 503 et seq.; Verpraet – Lecerf, pp. 57 et seq.; Brinkhorst – Schermers, pp. 261 and 262.

[61] Of these 595 have been determined by judgement 82 cases are pending, the balance has been ended without judgement. The EEC and Montanunion treaties participate by equal shares of about fifty per cent., the Euratom Treaty by three per cent. in the overall number of cases.

[62] See Chapter VIII, paragraph 276.

[63] Green, p. 220.

[64] According to the data of Green (until 1968, incl.) of hundred cases twenty were won by the plaintiffs, the balance of eighty were cases of unruliness against the "European way", so that eventually the enforcing agencies were victorious.

[65] Ipsen (2), pp. 370 et seq.

[66] In this connexion it may be mentioned that since a judgement affects a number of issues of law the Case Book discusses the judgements reduced to the system of what is called Community law. In this way it conveys an idea of how the Court in its administration of justice supplements and develops the basic treaties and other Community sources of law (See the List of sources: Brinkhorst – Schermers).

[67] The question has been treated extensively by Green (pp. 335 to 413), Brinkhorst – Schermers (pp. 103 to 176), Ipsen (2) (pp. 215 – 314), Dumon (pp. 339 to 398).

[68] Rome Treaty, §§5, 85, 189, 191 and 192; Euratom Treaty, §§.145 and 164; Montanunion Treaty, §.92.

[69] Practice has been treated by Brinkhorst – Schermers, pp. 103 et seq.

[70] The source: General Report 1971, p. 531 (Entscheidungen einzelstaatlicher Gerichte auf dem Gebiet des Gemeinschaftsrechts).

[71] The question has been treated by Brinkhorst – Schermers, pp. 104 et seq.

[72] Euratom Treaty, §.49.

[73] The judicial practice of the United Kingdom is still inconsistent: contrary to several conflicting decisions of the lower courts the general norm is still that of absolute immunity (see paragraph 311, above).

[74] The corresponding decision: „... with a view to choosing the best method of resolving the difficulties existing in this matter, whether by elaborating a Convention or by other means that seem appropriate" quoted by Sinclair, p. 266.

[75] The procedure of ratification still remains to be complicated. For the antecedents of codification see Sinclair, p. 266; for the actual practice of the United Kingdom see paragraph 8, above.

[76] European Convention on State Immunity, §§.24 to 26.

[77] Ibid., §.1.

[78] Ibid., §§.2 and 3.

[79] Ibid., §.4.

[80] Ibid., §.5.

[81] Ibid., §.6.

[82] Ibid., §.7.

[83] Ibid., §.8.

[84] Ibid., §§.9 and 10; it should be noted that there is no connecting link in the Convention regarding movable or immovable estate, presumably on account of the difficulty to come to an agreement. The same applies to gifts for the benefit of the State. As a matter of fact it would be hard to agree upon the "preferred" forum for cases arising from property scattered about at different places. In principle all forums are "preferred" with the limitation, however, that denial of execution by the passively affected State has been made easier by the Convention (Immunity Convention, §. 20).

[85] §.11 of the Immunity Convention. This article does not, however, apply to damage caused by unfair competition: see Sinclair, p. 271.

[86] Immunity Convention, §.12.

[87] Ibid., §.14.

[88] Accordingly "any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued in its own name" would not qualify for immunity, or in other words, the Convention would not be applicable to it. This formulation is strong

to an extent that its strict interpretation is likely (see Sinclair, p. 278), namely that immunity may be pleaded by *sui generis* units of a State capable of suing or being sued at any time. In point of fact in a number of legal systems the sovereign and administrative organs of a State are vested with active and passive legal capacity.

[89] Immunity Convention, §§.29 to 32: on the limitation of the operation of the Convention see Sinclair (Exclusions) pp. 281 and 282.

[90] See paragraph 321, above.

[91] See Sinclair, p. 283.

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ГОСУДАРСТВО В ХОЗЯЙСТВЕННОЙ ЖИЗНИ В ПРАВЕ ОБЩЕГО РЫНКА

РЕЗЮМЕ

Статья составляет часть большего труда, находящегося в подготовке. Исходным пунктом является, что современный капитализм характеризуется нарастающим участием государства в разных конкретных хозяйственных операциях (государственные предприятия, государственные заказы, и. т.д.). Это является одной из характерных специфик западноевропейской экономической интеграции и выражающего это права Общества. Обеспеченность оборота и интересы, связывающиеся с выполнением экономических обязательств, требуют гарантийных институтов осуществления судом права. Это ставит проблему т. н. релятивного иммунитета. Статья анализирует, что по этому вопросу как формировалась до сих пор юридическая практика развитых капиталистических стран, потом рассматривает, что релятивный иммунитет в какой форме появляется в праве Европейского Экономического Сообщества. Важнейшие обсуждённые вопросы: правовые споры, относящиеся к межгосударственным предприятиям Общества и имунитет; суд ЕЭС и иммунитет; осуществление прав Общества в практике национальных судов; соглашение о европейском иммунитете, как попытка к обобщению релятивного иммунитета.

L'ÉTAT DANS L'ÉCONOMIE VERSUS L'IMMUNITÉ DANS LE DROIT DU MARCHÉ COMMUN

RÉSUMÉ

Cette étude est l'un des chapitres d'un ouvrage plus large en voie d'exécution sur le mécanisme juridique du Marché Commun. Son point initial est que l'un des traits caractéristique du capitalisme contemporain est la participation progressive de l'Etat dans les différentes opérations économiques concretes (entreprise publique, marchés publiques etc.). C'est une des spécificités importantes de l'intégration économique de l'Europe occidentale ainsi que du droit communautaire qui la symbolise. La circulation des marchandises et services, les interets qui se rattachent a l'accomplissement de l'engagement économique exigent aussi les institutions garantielles. Ceci souleve le probleme de l'immunité relative. Cette étude analyse concernant cette question comment a été réalisée la pratique juridique des pays capitalistes développés, puis elle examine de quelle maniere est-ce que l'immunité relative apparait dans le droit de la Communauté Européenne Économique. Les questions les plus importantes sont: Les litiges et l'immunité relatifs aux entreprises publiques communautaires-interétatiques, le Tribunal de la Communauté et l'immunité, la réalisation du droit communautaire dans la pratique des tribunaux nationaux, la Convention Européenne de l'immunité, comme expérience, pour la généralisation de l'immunité relative.